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No. 87-343

In The

Supreme Court of the United States

October Term, 1987

STATE OF MONTANA; JOHN D. LaFAVER, Director, Montana Department of Revenue; BIG HORN COUNTY, Montana; TREASURE COUNTY, Montana, YELLOWSTONE COUNTY, Montana; LORRAINE HAMILTON, Treasurer, Big Horn County, Montana; KATHLEEN THOMAS, Treasurer, Treasure County, Montana; and MAY JENKINS, Treasurer, Yellowstone County, Montana,

Appellants,

vs.

CROW TRIBE OF INDIANS; UNITED STATES OF AMERICA; and WESTMORELAND RESOURCES, INC.,

Appellees.

ON APPEAL FROM THE NINTH CIRCUIT COURT OF APPEALS

MOTION TO AFFIRM

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Pursuant to Rule 16.1 of the Rules of this Court, the Crow Tribe of Indians moves that the judgment of the United States Court of Appeals for the Ninth Circuit be affirmed.

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OPINION BELOW

The opinion of the court of appeals (App. 1a-21a) is reported at 819 F.2d 895. The opinion of the district court (App. 22a-74a) is not reported. The opinion of the court of appeals in a previous appeal (App. 79a-106a) is report-

ed at 650 F.2d 1104, *amended*, 665 F.2d 1390, *cert. denied*, 459 U.S. 916. The district court's first decision in the case is reported at 469 F. Supp. 154.

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JURISDICTION

The judgment of the court of appeals was entered on June 11, 1987. The notice of appeal to this Court was filed on June 24, 1987 (App. 107a-109a), and the jurisdictional statement was filed on August 28, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2).

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STATEMENT OF THE CASE

Vast reserves of coal underlie the eastern portion of the Crow Indian Reservation and the area immediately to the north of the acknowledged reservation known as the ceded strip.[1] App. 25a. Coal is the Tribe's primary asset; its development is the key to alleviating the severe poverty of the Crow Tribe and its members and putting the tribal government on a sound economic footing. Since 1967, the Secretary of the Interior has been actively involved in the development of the Tribe's coal resources.

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[1]The undisposed coal reserves within the ceded strip constitute part of the Crow Reservation. App. 7a. The ceded strip minerals have always been "reserved" for the Crow Tribe in one form or another. See, App. 26a-32a.

App. 46a; I Tr. 46-52; Ex. 42 at I-1, IV-1 to IV-11; Ex. D-344 at 18-19, 20-25.

In 1972, Westmoreland Resources, Inc., a non-Indian company, entered into two leases with the Crow Tribe to mine coal underlying the "ceded strip" in Big Horn County pursuant to the Indian Mineral Leasing Act of 1938. App. 32a, 45a. Westmoreland has been producing and selling tribal coal since that time. App. 33a. Virtually all of Westmoreland's production has been sold to four midwestern utilities through long-term contracts which expire in 1993. *Ibid.*

In 1975, the State of Montana enacted statutes that impose on coal mine operators a severance tax on each ton of coal produced in the State and a gross proceeds tax on the sale of each ton of coal. App. 46a. Montana's coal taxes with an effective rate of 32.9 percent are the highest in the nation, more than twice as high as the next highest state, Wyoming. Ex. 42 at I-6. Westmoreland Resources has been paying Montana's severance and gross proceeds taxes since 1975. App. 54a.

Between 1976 and 1982, Westmoreland paid approximately $53,800,000 in severance and $8,100,000 in gross proceeds taxes on the production and sale of Crow coal. App. 5a. During the same period, Westmoreland paid the Crow Tribe $14,400,000 in royalties. Ex. 42 at I-9. In addition, Westmoreland and Morrison-Knudsen, the contract mine operator for the Westmoreland mine, paid state income and property taxes. These payments amounted to more than $3 million from 1976 to 1982. Ex. 42 at I-13; III Tr. 396-98. Westmoreland also paid $.5 million in re-

source indemnity taxes.[2] Ex. 42 at I-13. In sum, excluding state and local taxes paid by mine employees, the State of Montana and Big Horn County have received approximately 4½ times more in revenues from the Westmoreland mine than has the Crow Tribe. Ex. 42 at xiv.

In January 1976, the Tribe enacted its own Coal Tax Code which provides for a tax of 25% of the value of coal mined by the Tribe's lessees. App. 53a. The Interior Department approved the Code as applicable to coal mined on the Crow reservation, but not to the Tribe's coal on the ceded strip owing to a limitation in the Crow Constitution. App. 6a. That tax has not been applied to nor collected from any coal producer. App. 54a.

Westmoreland and the Tribe agreed to an amendment to their lease, effective September 1982, which was approved by the Department of the Interior and provides that Westmoreland will pay the Tribe severance and gross proceeds taxes equal to the amount of Montana's taxes but not in excess of the Tribe's taxes. In turn, the Tribe agreed that the amount of tribal taxes payable by Westmoreland would be offset by the amount of severance and gross proceeds taxes that Westmoreland is required to pay Montana. App. 54a.

In 1980, the Crow Tribe and Shell Oil Company entered into a coal mining agreement covering approximate-

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[2]Montana's resource indemnity trust tax of .5 percent of the value of all minerals mined in the state is held in a segregated trust account "to improve the total environment and rectify damage thereto." Mont. Code Ann. Secs. 15-38-104, 15-38-203. The Crow Tribe has not challenged the application of this tax to its coal resources .

ly 9500 acres in the southeastern corner of the Crow Reservation. App. 33a. The agreement was approved by the Secretary of Interior in April 1983, under the authority of the Indian Mineral Development Act. Ex. 410; I Tr. 52-55. To avoid double taxation, Shell agreed to pay the Crow Tribe "an amount equal to the Montana state severance tax existing at the time (currently 30 percent of sales price excluding taxes based on production) less whatever is required to be paid to the State of Montana." Ex. 78 at 72.

Shell has been unable to market Crow coal due, in large measure, to the potential applicability of Montana's coal taxes—taxes which are not imposed on the Wyoming coal with which it competes. App. 6a; I Tr. 158-67; IV Tr. 577; Ex. 42 at III-20-26. Shell surrendered its rights in December, 1985. App. 6a.

Modern day surface mining of coal is capital rather labor intensive. Westmoreland and its mining contractor employ 112 people to mine approximately 40 acres a year. II Tr. 251-252. Fifty-five percent of the 72 hourly workers are either Crow Indians or married to Crow Indians. II Tr. 253. Most of the employees reside in the Town of Hardin or on the Crow Reservation. II Tr. 254-55.

The direct governmental cost attributable to the mining of Crow coal by Westmoreland Resources, Inc. amounted to $38 million between 1970 and 1982. For the same period state, local and excise taxes, other than the coal taxes, yielded Montana state and local governments with $42 million. App. 16a. As of 1981, Montana allocated 8.75% of its severance tax revenue to environmental or coal related services. *Ibid.*

In 1978 the Crow Tribe brought this suit against the State of Montana and the treasurers of Big Horn, Yellowstone, and Treasure Counties, seeking declaratory and injunctive relief against the imposition of Montana's severance and gross proceeds taxes on the production and sale of Crow coal. Westmoreland, the only producer of Crow coal, intervened. The United States District Court for the District of Montana dismissed the Tribe's Complaint for failure to state a claim upon which relief could be granted.

The court of appeals reversed and remanded. This Court denied Montana's Petition for Certiorari. Following remand, the United States intervened on the Tribe's behalf. After trial, the district court entered judgment in favor of Montana. The court of appeals reserved. Montana then appealed to this Court.

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ARGUMENT

1. Montana claims that a substantial federal question is presented as to state authority to tax tribally owned minerals located outside the boundaries of a reservation. That question, however, is not presented by the facts of this case.

The tribally owned coal which Montana seeks to tax is located in an area known as the Crow ceded strip. The background of the creation of the ceded strip through the 1904 cession of Crow Reservation land and the subsequent restoration of the land and minerals to tribal ownership

is set forth in the district court findings and conclusions —none of which is challenged by Montana. App. 26a-31a and 60a-62a.

Through the Act of May 19, 1958, 72 Stat. 121, Congress restored the previously ceded lands and minerals on the Crow ceded strip to tribal ownership and made them part of the reservation. Section 2 of the 1958 Act provides:

> Title to the lands restored to tribal ownership by this Act shall be held by the United States in trust for the respective tribe or tribes, and *such lands are hereby added to and made part of the existing reservations* for such tribe or tribes [emphasis added] [72 Stat. 121].

The court below applied the plain meaning rule in concluding that the ceded strip lands and minerals were restored to reservation status by the 1958 Act. App. 7a.

The legislative history of the 1958 Act reflects that Congress was specifically informed that the ceded area was not then considered a part of the Crow Reservation. Accordingly, the language of Section 2 was added to insure that the land restored to Crow ownership would also be made a part of the Crow reservation.

The explanation for the language restoring the ceded lands both to tribal ownership and reservation status is contained in the reports of the Congressional Committees that considered the proposed legislation and recommended its enactment. Both the Senate and House Reports, S.Rep. 1508, 85th Cong., 2d Sess. (1958), App. 249a; H. Rep. 1336, 85th Cong., 2d Sess. (1958), include the letter reports of the Secretary of the Interior, dated June 25, 1957,

on the then pending bills. App. 251a-254a. The two Interior Department reports are identical. They recommend that the bills be enacted if amended as suggested by the Secretary.

With regard to the reservation provision, the letter reports from the Interior Department state (with emphasis added):

> We recommend that the bill be amended to conform to the draft bill enclosed with this report. With one exception (par. 5 below), the changes relate to matters of form and do not affect the substance of the bill. They are as follows: . . .
>
> 4. *The lands are made part of the existing reservation for the tribes.*
>
> 5. The tribes are authorized to sell or exchange the restored lands, with the approval of the Secretary of the Interior. *In the case of the Crow Tribe, the restored lands are outside the boundaries of the diminished reservation* and the tribe has indicated that it will probably want to negotiate sales or exchanges in order to make best use of the lands. The other tribes may encounter the same need.

S. Rep. 1508, *supra*, at 3, App. 253a-254a; H. Rep. 1336, *supra*, at 3. The Interior Department's proposed bill, which includes the language of the reservation provision as it was eventually enacted in Section 2 of the 1958 Act, is reproduced in S. Rep. 1508, *supra*, at 4, App. 254a-255a.

Had Congress intended merely to restore the ceded strip lands to tribal ownership, it could easily have done so without also restoring the lands to the existing reservation. Congress obviously intended to do both. The court of appeals' conclusion that the 1958 Act restored ceded

strip lands and minerals to reservation status is manifestly correct.

Montana does not seriously challenge the court of appeals' construction of the 1958 Act. Rather, Montana's claim is that the *surface* overlying the minerals which were restored to reservation status by the 1958 Act is outside the boundaries of the acknowledged reservation; that the state exercises general civil jurisdiction over the surface of the ceded strip; and therefore pre-emption standards for off reservation activities should apply.

But questions regarding jurisdiction over the surface of the ceded strip are not at issue in this case. Montana seeks to tax the severance of subsurface trust minerals which have been "added to and made a part of" the Crow reservation. While the history and status of the ceded strip is unusual, there is no ambiguity in the congressional action restoring the ceded strip lands and minerals to the Crow reservation. The court of appeals' application of the established pre-emption standards for reservation resources merely gave effect to the 1958 congressional action.

2. With respect to pre-emption the court of appeals correctly applied settled principles of federal Indian law. This Court articulated pre-emption standards governing the power of the States to tax and regulate activities on Indian reservations in *California v. Cabazon Band of Mission Indians*, 107 S.Ct. 1083 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832 (1982); and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). In each of these cases the state tax or regula-

tion was held invalid because it impeded overriding federal objectives.

In *New Mexico v. Mescalero Apache Tribe, supra,* the Court extrapolated the governing principles:

> The exercise of state authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the State in connection with on-reservation activity . . . Thus a State seeking to impose a tax on a transaction between a tribe and non-members must ordinarily point to more than its general interest in raising revenues . . .

462 U.S. at 336. The court below applied these standards and held that Montana's coal taxes were not narrowly tailored to achieve legitimate state interests. App. 15a-17a.

In this case, Montana's interest in taxing coal owned by the Crow Tribe is primarily designed to raise revenue for general governmental purposes—only 8.75% of the tax revenue is spent for enviromental or coal-related services. App. 16a. A state's general interest in revenue raising is not sufficient to justify impeding federal interests. *Ramah Navajo School Board, supra,* at 843 and n.7; *White Mountain Apache Tribe v. Bracker, supra,* at 148-149. *Cf. Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 158 n. 26 (1982) (state tax on Indian minerals must be fairly related to state services).

Last term this Court in *California v. Cabazon Band of Mission Indians,* 107 S. Ct. 1083 (1987), reaffirmed the pre-emption principles articulated in *Bracker, Ramah,* and *Mescalero, supra,* and emphasized once again that

traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development "are important federal interests." 107 S.Ct. at 1092. Application of *Cabazon* is particularly appropriate where, as here, tribal trust resources have been developed under a federal statute intended "to insure that Indians received 'the greatest return from their property.' " *Montana v. Blackfeet Tribe*, 471 U.S. 759, 767 n.5 (1985).

Nothing in the court of appeals decision suggests that a state may not impose a tax which is fairly related to state regulatory functions or services. See App. 13a. It bears some emphasis in this connection that neither the Crow Tribe nor the United States has challenged Montana's resource indemnity trust tax of .5 percent of the value of all minerals mined in the state. Proceeds from that tax are placed in a trust account to be used "to improve the total environment and rectify damage thereto." Mont. Code Ann. Secs. 15-38-104, 15-38-203. Unlike the severance and gross proceeds taxes, this tax appears reasonably related to legitimate state concerns.

Montana made no effort to show that its severance and gross proceeds taxes are narrowly tailored to effectuate any legitimate state interest. The evidence showed that ordinary state and local taxes, other than the coal taxes, yielded more than sufficient revenue to pay for the governmental costs associated with coal mining. App. 16a. For that reason, Montana's attempt to justify its severance and gross proceeds taxes was weak. The court of appeals concluded that Montana has charged "a heavy

tax for indeterminable future costs, imposing on the Tribe the burden of the doubt." App. 16a. On the record before it, the court of appeals was compelled by the prior decisions of this Court to strike down Montana's exorbitant taxes.

CONCLUSION

For the reasons explained above, this case does not present any previously undecided substantial federal questions. The circumstances of the Crow ceded area are unique to this case and present no issue warranting plenary review by this Court. The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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